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THE ENFORCEMENT OF THE ARGENTINE ANTITRUST LAW

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The Enforcement of the Argentine Antitrust Law

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Abstract

This paper analyzes the basic characteristics of antitrust law in Argentina, and the way in which it has been enforced in several important cases. We begin with a section that introduces the evolution of the law, followed by another section about the basic economic and legal principles underlying that law. The rest of the paper describes the enforcement of the Argentine competition statutes, in a number of cases that involve collusive practices, exclusionary practices, vertical restraints, abuses of dominance, and mergers.

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1. Introduction

The aim of this paper is to analyze the basic characteristics of the Argentine antitrust law and the way in which it has been enforced throughout the years. It can be considered as an update of previous work (Coloma, 2009a). It begins with a short historical note about the different competition rules that existed in Argentina since 1923, ending with the enactment of the current legislation. Then it includes a section devoted to the analysis of the main features of the Argentine antitrust system, and its similarities and differences with the schemes used in other jurisdictions (especially the United States, and the countries belonging to the European Union).

The rest of the paper contains a review of the main Argentine antitrust cases. There are sections on collusive practices, horizontal exclusionary practices, vertical restraints, and exploitative abuses of dominance. Finally, we analyze several horizontal, vertical and conglomerate merger cases, and we end with a section that summarizes the whole paper and develops a few conclusions.

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2. Historic overview

Antitrust legislation took shape in Argentina in 1923, when the Argentine Congress passed Act No. 11,210. US antitrust law inspired the provisions of that statute, since the first two articles of Act No. 11,210 were virtually a translation of sections 1 and 2 of the Sherman Act (1890). Additionally, the statute contained the enumeration of a series of "monopoly practices", which were in general interpreted by the doctrine as specific cases that had to be included into the general principles established in the first two articles.

Act No. 11,210 was replaced by Act No. 12,906 in 1946. Article 1 of this statute prohibited practices tending to create a monopoly or to maintain a monopoly, while article 2 included a list of actions that were considered to be "special monopoly practices". The interpretation of these provisions was that such practices could be forbidden although they were not included in the general type that was described by article 1, since many of the special monopoly practices referred to concerted collusive practices that were not part of the general concept of monopolization. Like its predecessor, Act No. 12,906 was considered to be part of the Argentine criminal law, although it included an initial administrative procedure under the authority of the Department of Commerce of Argentina. To apply penalties, however, the Secretary of Commerce had to present a claim before the judicial authorities, which were the ones who ultimately decided about antitrust matters.

Both Act No. 11,210 and Act No. 12,906 had a very scarce enforcement, and the Argentine case law only tracks four cases that resulted in penalties during a period of fifty-eight years of application of these two statutes.[1] It was probably because of this lack of enforcement that in 1980 the authorities enacted a new competition statute, through Act No. 22,262 (also known as the "Competition Defense Act"). That rule created the first specific antitrust agency in Argentina, which is the National Commission for the Defense of Competition (CNDC). It also implied a movement towards European standards, since articles 1 and 2 of Act No. 22,262 were clearly

[1] This information appears in Cabanellas (2005), chapter 1.

inspired by articles 85 and 86 of the Treaty of Rome (i.e., by the current articles 101 and 102 of the Treaty on the Functioning of the European Union).

With the adoption of the provisions of Act No. 22,262, the Argentine antitrust case law began to grow, and it also became much more compact and coherent. This was largely due to the fact that the procedures established by that statute were strictly administrative, and therefore all antitrust cases passed before the CNDC. This helped to develop some homogeneous criteria about which practices were anticompetitive, and in many ways those criteria were also compatible with the main international antitrust standards. The CNDC, however, has never been an independent authority, but an agency that has worked as a counselor to the Secretary of Commerce of Argentina (who has been the ultimate responsible person for antitrust decisions).[2]

In August 1999, Congress replaced Act No. 22,262 with Act No. 25,156. This statute kept the majority of the substantial characteristics of its predecessor, especially in what concerned the characterization of anticompetitive practices. The most important innovation of Act No. 25,156, however, was the introduction of a merger notification system. Under that system, competition authorities began to review the main mergers and acquisitions that have had an impact on the Argentine markets.

Finally, in May 2018, a new competition statute was passed before the Argentine Congress, which is Act No. 27,442. This act was also an amendment of the previous statute, in the sense that it kept the main principles underlying Act No. 22,262 and Act No. 25,156. It nevertheless introduced a few important modifications, basically related to a distinction between "absolutely restrictive anticompetitive practices" and "other restrictive practices", to the implementation of a leniency program for the first of those groups of practices, and to the possibility of demanding for private damages as a result of antitrust cases.

[2] In fact, the name of the department in charge of enforcing the competition statutes has changed throughout the years. In the period 1996-1999, for example, the CNDC depended on the Secretary of Commerce, Industry and Mining. Between the years 2000 and 2003, it depended on the Secretary of Competition Defense, while in the period 2003-2006 the official in charge was the Secretary of Technical Coordination. Finally, between 2006 and 2013, and between 2018 and 2020, the name of the official in charge has been "Secretary of Interior Commerce".

Act No. 27,442 also created a new enforcement agency, whose name is "National Competition Authority" (ANC). That agency has been designed to replace the previously existing CNDC, and to become the only Argentine antitrust agency, with both prosecution and adjudication powers. The main difference between the CNDC and the ANC is that the latter is aimed to be an independent authority, since its decisions do not have to be endorsed by the Secretary of Commerce. By the midst of the year 2020, however, the organization of the ANC still remains pending. All antitrust cases decided under Act No. 27,442 have therefore been analyzed by the authorities established by the old competition statutes (that is, by the CNDC and the Secretary of Commerce).

3. Characteristics of the Argentine competition law

As we mentioned in the previous section, the Argentine competition law follows the basic antitrust standards set by articles 101 and 102 of the Treaty on the Functioning of the European Union. Because of this European influence, the two main offenses under the Argentine competition act are the lessening of competition and the abuse of a dominant position (article 1, Act No. 27,442). However, as Cabanellas (2005) mentions, the way in which the Argentine competition law defines these two offenses allows for some overlap between them. Unlike the European Union law, the Argentine competition law does not require that the anticompetitive practices that fall into the concept of "lessening of competition" are concerted practices among two or more undertakings. It is therefore possible that a unilateral anticompetitive practice (e.g., an exclusionary practice such as predatory pricing or entry deterrence) be considered at the same time a lessening of competition and an abuse of a dominant position.

Another requirement that Act No. 27,442 includes in its article 1 is that, in order to be illegal, anticompetitive practices must generate "damage to the general economic interest". This concept, which is not directly defined by the statute, has been interpreted by the CNDC and the Argentine courts in different ways. The most widespread interpretation has associated it with the economic concept of "total

surplus", that is, with the sum of the consumers' surplus and the producers' profit generated in a market.[3] This idea implies that, in order to be illegal, a business practice has to be, at the same time, anticompetitive (in the sense that it implies a lessening of competition or an abuse of dominance) and inefficient (in the sense that it generates a reduction in the economic surplus generated in the relevant market). The concept of general economic interest is also opposed to the concept of private interest, emphasizing the idea that an anticompetitive practice has to affect the market as a whole and not only the distribution of a given surplus between buyers and sellers.

Act No. 27,442, however, includes in its article 2 a presumption that there are a few anticompetitive practices that typically damage the general economic interest. Those practices are the ones that, in many jurisdictions, are considered as indicative of the existence of "hard-core cartels", i.e., agreements between competitors that are related to price fixing, quantity restrictions, market divisions or bid rigging. This is a signal that the current Argentine antitrust statute has (in the sense that those practices are seen as "more anticompetitive" than other practices that can be included into the general definition of article 1), but it does not seem to imply that they are *per se* illegal. Quite the contrary, Act No. 27,442 includes a provision, stated on article 29, which allows the antitrust authority to authorize contracts and agreements that include practices mentioned in article 2, provided that they "do not generate damage to the general economic interest".[4]

Several other possibly anticompetitive practices that are not included in article 2 are mentioned in article 3 of Act No. 27,442. This list, which states twelve different types of anticompetitive practices, is nevertheless not exclusive, in the sense that other practices can be considered illegal if they enter into the general definition of

[3] That interpretation appears in a document issued by the CNDC (1997), and it has also appeared in several sentences of the Argentine Court of Appeals on Criminal Economic Matters. In some circumstances, however, the CNDC's interpretation of the concept of general economic interest has also associated it with the consumers' surplus alone. This is particularly true for several merger cases analyzed in the 21st century.

[4] The exact meaning of article 29 is still not fully understood by the Argentine antitrust doctrine, since the article itself has not yet been applied to any actual case. The regulation decree of Act No. 27,442 (Decree No. 480/2018) states a number of conditions for agreements to enter into the provisions of that article, which are basically a translation of section 3 of article 101 of the Treaty on the Functioning of the European Union.

article 1. Similarly, a business practice that falls into any of the types of article 3 is not considered illegal if it does not enter into the general definition of article 1 (that is, if it does not imply lessening competition or abusing a dominant position, or if it does not generate damage to the general economic interest).

Although the Argentine competition act does not define what an "abuse of a dominant position" is, its article 5 does contain a definition of the concept of "dominant position". Under that definition, a person enjoys a dominant position when he or she "is the only supplier or buyer in the … market or … when, without being the only one, he or she is not exposed to substantial competition or when, because of the degree of vertical or horizontal integration, he or she is able to determine the economic feasibility of a competitor or participant in the market". In order to establish if that standard is fulfilled by a certain undertaking in a concrete case, article 6 of Act No. 27,442 establishes that there are three circumstances to be considered, which are the extent to which the relevant goods or services may be replaced by other goods or services, the extent to which regulatory restrictions limit the access of products or suppliers or buyers to the relevant market, and the extent to which a firm has the power to unilaterally affect prices or to restrict the supply or demand in the market (and the extent to which its competitors are able to offset that power).

Following the European antitrust tradition, the Argentine competition authorities have considered that abuses of dominance can either be exclusionary or exploitative.[5] In cases of exclusionary abuses of dominance, the anticompetitive behavior punished by the law is the use of a dominant position to exclude competitors (either actual or potential). In cases of exploitative abuses of dominance, conversely, what is illegal is the imposition of prices or commercial conditions that are different to the ones that would exist if there were effective competition in the market.

As we mentioned in the previous section of this chapter, the Argentine competition legislation introduced a merger notification procedure in 1999, which was amended by Act No. 27,442 in 2018. This procedure is based on the application of a standard to analyze when a merger is anticompetitive, and has therefore to be

[5] For a definition of these two classes of abuse of dominance in the European context, see Neumann

prohibited or conditioned by the antitrust authority. That standard is set by article 8 of Act No. 27,442 (which is identical to the former article 7 of Act No. 25,156), and it strongly resembles the one that appears in section 7 of the Clayton Act (which is the analogous US legislation). In order to be prohibited, a merger has to restrict or distort competition, in a manner that may generate damage to the general economic interest.

Argentine competition law concerning mergers also has a strong point of connection with US law because the Argentine antitrust authorities have issued a set of guidelines that is very similar to the horizontal merger guidelines issued in the United States by the Department of Justice and the Federal Trade Commission.[6] Following this US precedent, the Argentine merger guidelines have sections that deal with the definition of relevant markets, the measurement of market concentration, the nature of the firms that compete in the relevant markets, the entry barriers, the efficiency gains generated by a merger, and the failing firm defense. These guidelines also have a few paragraphs devoted to vertical and conglomerate mergers, and a relatively original section about the role of imports in merger analysis.

The other distinctive characteristics of the Argentine antitrust law have to do with the procedural aspects of the competition statute's enforcement. As we mentioned in section 1 of this paper, the Argentine antitrust system is based on the existence of a single competition agency which at the same time investigates the anticompetitive conduct cases, decides on the merits of those cases, and authorizes and/or blocks mergers. The decisions of that agency can be appealed before the judicial courts, but all procedures have to begin before the administrative agency.

Unlike other competition agencies, the Argentine competition authority has not yet established any procedure of authorization of possibly anticompetitive practices. All cases of anticompetitive conduct have therefore been analyzed as the result of complaints of private parties or have been initiated *ex officio* by the CNDC (when that agency has believed that a certain economic agent or group of agents was engaging in an anticompetitive practice). Previous authorization of mergers,

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(2001), chapter 3.

[6] The current Argentine merger guidelines were approved by Resolution 208/2018, issued by the Secretary of Commerce of Argentina.

conversely, is required when there is a merger transaction that surpasses a certain sales threshold (which is currently set in 4.06 billion Argentine pesos) and a certain transaction threshold (which is currently set in 812 million Argentine pesos).[7]

When a person or firm is found guilty of an antitrust offense, the possible penalties established by Act No. 27,442 are fines of up to 8.12 billion Argentine pesos,[8] and cease-and-desist orders for the practices deemed illegal. In some cases, both penalties are applied jointly. The defendant in an anticompetitive conduct case can also offer a commitment to stop the practice under analysis, and the case can end with the acceptance of that commitment by the competition authority. Of course, conduct cases can also end with the acceptance of the defendant's explanations, which implies that the defendant is not considered guilty of any anticompetitive practice.

In merger cases, conversely, fines are unlikely to be applied,[9] since merger transactions are analyzed before they take place.[10] The possible decisions of the antitrust agency in those cases are the unconditioned approval of the merger, the approval of the merger under certain structural or behavioral conditions (or "remedies") to be fulfilled by the merging parties, and the complete prohibition of the merger. The most common structural remedies that appear in merger cases are obligations to divest part of the newly merged entity, through the sale of a certain number of shares, outlets, plants, commercial brands or other equivalent assets. The most common behavioral remedies, in turn, consist of prohibitions to discriminate between different customers or suppliers, requirements to give competitors access to certain facilities, and requirements to give customers the option to change their supplier.

[7] These are approximately equivalent to US$ 54 million and US$ 11 million, respectively (using the average peso-dollar exchange rate of August 2018).
[8] These are roughly equivalent to US$ 108 million (using the average peso-dollar exchange rate of August 2018).
[9] The only fines that are sometimes applied in merger cases have to do with situations of late notification, or situations in which firms refuse to give some essential information to the antitrust authority.
[10] In fact, these cases in Argentina always begin before a merger takes place, but the actual approval or prohibition can occur many months or even years after the merger has occurred. This point has been criticized by some commentators (see, for example, OECD, 2006, chapter 6).

4. Collusive practices

As in many countries, collusion is considered to be one of the main antitrust offenses in Argentina. This is particularly so since the enactment of Act No. 27,442, which includes the four main cases of hard-core cartels in its article 2. That article, as we have mentioned in the previous section, states that those cases (that refer to price fixing, quantity fixing, horizontal market division, and bid rigging) are considered as "absolutely restrictive of competition".

A few additional collusive practices are mentioned in article 3 of Act No. 27,442, and they are therefore not seen as "absolutely restrictive". These are the ones related to agreements to limit investments (paragraph "c"), agreements to restrict research and development (paragraph "e") and interlocking directorates (paragraph "l"), and they are all examples of possibly anticompetitive practices that may fall into the general prohibition set by article 1 of Act No. 27,442.

Although Argentina is generally perceived as a country that does not punish any anticompetitive practice on a *per se* basis,[11] the CNDC and the courts of appeals that have analyzed overt collusion cases have always found price fixing, quantity fixing, bid rigging and horizontal market divisions to be illegal, when they considered that those practices were adequately proven. This has occurred even many years before Act No. 27,442 was passed, and an early example of that idea can be found in "Buenos Aires Sand Storage vs. Argentine Sand Company and others" (1986), decided under Act No. 22,262. In that case, a group of sand manufacturers was fined for establishing production quotas, through an agreement that also included the trade unions that represented the shipping workers who transported that sand.

Another early significant collusion case was "Lara Gas and others vs. Agip and others" (1993), in which a group of distributors of liquefied petroleum gas (LPG) was fined for having practiced a horizontal market division that restricted competition. This case was particularly important because it reached the Argentine Supreme Court, who had to analyze the question whether the general economic

[11] See, for example, Irízar and Boidi (2018).

interest was actually damaged by the agreement among the accused firms. When doing that, the Supreme Court established the principle that, if it is clear that the market conditions would be more favorable to consumers without the agreement, then the general economic interest has been damaged, although it be not possible to actually measure the amount of that damage.

Another, more recent, antitrust case that involved horizontal market division is "ADELCO and others vs. Cablevisión and Multicanal" (2011), in which two cable television companies were fined because of having apportioned their markets in two nearby cities (Santa Fe and Paraná) after one of those firms had bought a third competing undertaking. The effect of that market division, however, was relatively short in time, since both companies soon merged between themselves (and therefore became a single economic unit).

The most important price-fixing case analyzed by the CNDC, which ended in fines to be paid by the defendants, is probably "AGP vs. CCAP and others" (1996). In that case, the main stowing companies of the port of Buenos Aires fixed a uniform fee for each container that they stowed.[12] Finally, the most important bid-rigging case (which resulted in substantial fines) is "CNDC vs. Air Liquide and others" (2005), in which a group of oxygen producers was punished for having coordinated their bids in certain auctions organized by several Buenos Aires public hospitals (when they bought oxygen for medical purposes).[13]

If the basic Argentine antitrust doctrine is relatively harsh when overt collusion is detected, it is also relatively cautious in cases of covert collusion. In "Department of Energy vs. YPF, Esso and Shell" (1994), for example, the CNDC set the principle that conscious parallelism is not enough to prove collusion. This case involved allegations of price fixing among the three main fuel refiners operating in Argentina. That principle was also applied in several other cases, such as "Fecliba vs. Roux Ocefa, Rivero and Fidex" (1998), where three pharmaceutical companies were accused of agreeing about the prices of their physiological serums; and "Aviabue vs.

[12] Other, more recent, price-fixing cases that also ended in fines are "ATTI vs. Esso and others" (2010), "C. Zuccotti vs. Costera Criolla and Messina SRL" (2015) and "CADESA and Universal Assistance vs. San Carlos Hospital and others" (2018).

American Airlines, United Airlines and British Airways" (2001), where three airlines were accused of jointly reducing the commissions that they paid to their travel agents in Argentina.[14]

A few cases of covert collusion, however, ended in fines when the competition authorities found certain restraints that were capable to facilitate collusive behavior. By far the most important of them has been "CNDC vs. Loma Negra and others" (2005), where the four cement producers that operate in Argentina were found guilty of quantity fixing and other collusive practices. The main proof in that case was the existence of an information system, managed by the trade association of cement manufacturers, through which each firm had detailed information about the sales of the other firms in every urban area of Argentina.

Although Act No. 27,442 established a leniency program for collusive practices in 2018, by the midst of the year 2020 that program had not yet been applied in any concrete case. The main lines for that program appear on articles 60 and 61 of Act No. 27,442. These have to do with the idea that the program is only valid for practices included in article 2 (i.e., price fixing, quantity fixing, horizontal market division and bid rigging), that only the first member of a cartel that asks for leniency is able to obtain a full exemption of the corresponding penalties, that only the second member of a cartel that asks for leniency is able to obtain a reduction of those penalties (which range from 50% to 20%), and that the leniency program is valid not only for new cases but also for cases under investigation (provided that the antitrust authority has not yet collected enough evidence to close the case).

5. Horizontal exclusionary practices

In the list of anticompetitive practices that appears on article 3 of Act No. 27,442, there are at least three types of conduct that can be considered to be horizontal and exclusionary. These are the ones that appear on paragraphs "d", "i"

[13] A more recent, though less important, bid-rigging case is "CNDC vs. Fresenius and others" (2015).
[14] This idea about the insufficiency of conscious parallelism to prove the existence of collusion is consistent with the main international antitrust rules. In the US, for example, it was endorsed by the Supreme Court when deciding the case "Theatre Enterprises vs. Paramount" (1954), 346 US 537.

and "k", which state that practices such as entry deterrence, refusals to sale and predatory pricing can be illegal if they lessen competition or imply an abuse of dominance, and they damage the general economic interest.

The first case of entry deterrence that was analyzed by the CNDC in its history was "A. Savant vs. Matadero Vera" (1982), where the only slaughterhouse in a small city of the province of Santa Fe was found guilty of abuse of its dominant position when it refused to give access to its facilities to a cattle raiser (who was also the owner of a butcher's shop that competed against the slaughterhouse). This case is important because it implied the first example of use of the so-called "essential facilities' doctrine" in the Argentine antitrust law,[15] and because it was one of the first cases in which a firm was found guilty of abuse of dominance.

A more recent example of entry deterrence that was penalized with a fine is "Nueva Chevalier and others vs. Terminal Salta and La Veloz del Norte" (2011). In that case, the essential facility was the terminal bus station of the city of Salta, which was controlled by a firm (Terminal Salta) that belonged to the same economic group than one of the companies that used that bus station (La Veloz del Norte). The anticompetitive behavior in this case consisted of a series of practices related to discrimination and exclusion of rival undertakings that were also trying to offer their transportation services in the same market than La Veloz del Norte.[16]

Another relatively important case of entry deterrence, which did not make use of the essential facilities' doctrine, has been "Procter & Gamble vs. Unilever and others" (1999). In it, the largest powder soap producer in Argentina (Unilever) was accused of deterring the entry of a new brand of its main competitor (Procter & Gamble), through the use of unfair advertising. Although the CNDC found that the

[15] The essential facilities' doctrine was first applied in the history of antitrust law by the US Supreme Court in 1912, in the sentence that closed the case called "US vs. Terminal Railroad Association", 224 US 383. In Europe, its use is much more modern. Goyder (1998), for example, cites a case of 1992 as the first application of this doctrine by the European Commission ("B&I vs. Sealink", 5 CMLR 255).

[16] Another interesting case that can also be linked to the essential facilities' doctrine is "CICSA vs. CMQ" (2013), in which the supposedly essential asset was the stock of proprietary beer bottles of the dominant beer manufacturer of Argentina. This case ended with a commitment from the defendant (and a similar commitment from the plaintiff, which was the second-largest beer manufacturer) to establish a system of "bottle clearing", in which consumers were able to trade in bottles from the different beer brands without being tied to any specific manufacturer.

practice under analysis was probably designed to harm the plaintiff's interests, this case ended without a penalty, since it was also considered that the means used were not enough to deter the entry of the new powder soap brand.

Another relevant entry-deterrence case, which ended without a penalty but implied an important precedent for future cases, was "Executive Class vs. Argentine Air Force and Manuel Tienda León" (1998), where the CNDC set a principle that resembles the so-called "Noerr-Pennington doctrine".[17] In that case, a taxi-cab company objected an agreement between the Argentine Air Force (which at that time was in charge of operating the Argentine airports) and a firm that supplied ground transportation services (both through buses and taxi-cabs), through which the former gave exclusivity to the latter to offer its services in the Buenos Aires international airport. Although the CNDC considered that the practice under analysis restricted competition and was unreasonable (since there were no valid reasons to grant exclusivity when several firms could compete to supply their services), it considered that its origin was a regulation issued by the government, which was exempted from antitrust scrutiny. The Argentine competition agency, nevertheless, recommended that such regulation be eliminated, but it applied no penalty either to the Air Force or to the accused ground transportation supplier.

The Argentine antitrust case law also has several examples of horizontal exclusionary practices that were carried out by a group of competitors in order to deter other firms to enter a market. Many of those cases had to do with entities that group health service providers, such as physicians' and hospitals' associations. The first example of this type is "Staff Médico vs. FeMeBA" (1982), where a private health management organization accused the physicians' association of the province of Buenos Aires to impede its affiliates to work for it, in order to benefit its own health management organization and to deter the plaintiff from entering the market.

[17] This doctrine originated in the US as a consequence of the cases "Noerr vs. Eastern Railroads" (365 US 127, 1961) and "Pennington vs. United Mine Workers" (381 US 657, 1965). It is a principle under which the actions to influence government decisions (and the government decisions taken as a consequence of that influence) are not illegal, even when they be aimed towards lessening competition or damaging competitors. This is because such actions are allowed by other laws and regulations different from antitrust law, and may therefore have other policy goals different from the defense of competition.

This case ended with a fine, and was the first of a relatively long list of cases where physicians', hospitals' and other health providers' associations, which had a dominant position in a certain province or city in Argentina, were penalized for practices aimed at lessening competition.[18]

Very few penalties can be found, conversely, in cases where the plaintiffs alleged predatory pricing practices. One example of these is "CNDC vs. Santiago del Estero Bakers' Center and others" (1983), where a group of bakeries were penalized for predatory actions against a competitor. The conduct on the part of the bakers' center, however, was part of a strategy to manage a collusive agreement in the city of Santiago del Estero, where the members of that agreement undertook predatory pricing to discipline a baker's store that abandoned the cartel.

But the most significant predatory pricing case that the CNDC has analyzed (which was "Argentine Chamber of Stationer's Stores vs. Makro Supermarkets", 1997) ended with the opinion that the practice was not anticompetitive. The case involved a supermarket chain that sold a stationery product below its wholesale price, during a relatively short period of time. Although in this case it was clear that the product was sold below its marginal cost, the CNDC understood that no offense to the competition law existed, since the accused supermarket had a very small market share and had no intention or possibility to exclude competitors.[19] Its practice of selling a product at a low price was therefore part of a business strategy to attract customers to its outlets, aimed at competing against other supermarkets to capture the preferences of those customers.[20]

The Argentine antitrust case law also has a few examples of situations in which there were allegations of price squeezes. The most important one had to do

[18] Among those cases, we can mention "V. Godoy vs. Medical Circle of South Misiones" (1997), "CODESA vs. Association of Clinics of Tucumán" (2000), "R. Barisio vs. Dentists' Circle of Venado Tuerto" (2005), "H. Ghiggeri vs. Biochemists' Association of Chaco" (2010), and "Swiss Medical vs. ACLISASA and others" (2017).

[19] The standard set by the CNDC in this case resembles the one proposed by Joskow and Klevorick (1979), which is explicitly cited in the CNDC's opinion. It consists of first analyzing the existing market structure, and then appraising the effect of possible below-cost sales only if that structure facilitates the implementation of predatory strategies.

[20] After the Makro case, the CNDC has opened a few other files that involved predatory pricing allegations. The most important ones are "Impsat vs. Telefonica and Telecom" (2006) and "La Veloz

with the steel industry, and was "Ventachap and others vs. Siderar" (2004). The defendant (Siderar) was an integrated firm that had a dominant position in an input market (full-hard laminated steel sheets) and also operated in an output market (coated steel sheets). Its alleged offense to competition law was a practice that consisted of setting high prices in the input market and relatively low prices in the output market, to squeeze and subsequently acquire a competing undertaking (Comesi) that only operated in the output market. This case is important because it is an example of the use of a structured rule of reason known in the international antitrust literature as the "Alcoa test".[21] It implies analyzing the existence of market power in the input market, the existence of excessive prices in that market, and the possibility that those prices generate an increase in the competitor's cost, that hinders its ability to compete in the output market. In this case, however, the application of that criterion produced an ambiguous result in terms of competitive effects, and the case was finally closed without penalties for the defendant.

Relatively similar to the Siderar case was "Petroquímica Cuyo vs. PBB Polisur" (2012), in which the objected practice was not a price squeeze but a refusal to sell a certain petrochemical input (ethylene) to the manufacturer of another petrochemical product (polypropylene), from a company that had a dominant position in the input market (PBB Polisur) and was also a competitor of the plaintiff (Petroquímica Cuyo) in the output market. This case did not end with a penalty, either, but it was closed with the acceptance of a commitment from the defendant to continue selling its product to Petroquímica Cuyo under non-discriminatory conditions.

Finally, the Argentine antitrust case law has another price squeeze example that ended with a penalty for the defendant, which is "COPCA vs. Telecom" (2014). That was a case against one of the major telecommunications' suppliers in Argentina (Telecom), and the plaintiff was a small firm (COPCA) that operated in a single city (Cruz Alta, in the province of Córdoba) and depended on Telecom to get access to the national interconnected telecommunications' system. In that case, the objected

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del Norte and VOSA vs. Flechabus" (2018), which were both closed without penalties.

behavior had to do with the price that Telecom charged to COPCA for that access, which exceeded the price that it was charging for the telephone calls of its own final customers. This case can also be seen as an example of the use of the essential facilities' doctrine, since the assets that Telecom had to redirect calls to the interconnected telecommunications' system were a highly specific and necessary facility for COPCA to compete in Cruz Alta's telephony market.

6. Vertical restraints

Despite the fact that the Argentine competition law characterizes anticompetitive practices following the European antitrust tradition, the appraisal of vertical restraints in Argentina has always been closer to the criteria applied in the United States. This is because the Argentine authorities have tended to consider that vertical restraints were less damaging for competition than horizontal restraints, and they have never issued regulations requiring notification or authorization procedures for those practices (as it has occurred in the European Union and in several of its member states). Nevertheless, article 3 of Act No. 27,442 mentions two kinds of vertical practices that can be seen as examples of anticompetitive conduct (if they fall into the general definition of illegal practices given by article 1). These are resale price maintenance (paragraph "a") and exclusive dealing (paragraph "g").

The first important case of vertical restraints analyzed by the CNDC, however, was about another practice which is not explicitly mentioned in the Argentine antitrust statutes, which is the use of exclusivity clauses concerning groups of customers. That case ("CNDC vs. Acfor and Igarreta", 1983) ended with a penalty set by the Secretary of Commerce, which was later reversed by the National Court of Appeals on Criminal Economic Matters. According to the CNDC, the relevant market here was the sale of automobiles of a certain brand (Ford) to government agencies, and the anticompetitive practice was a horizontal collusion between the accused car dealers to divide the market between themselves. The court of appeals, conversely, understood that this behavior was instead a vertical restraint imposed by the car

[21] This name refers to the US case "United States vs. Alcoa" (1945), 148 F2 416, 2nd Circuit.

manufacturer. The court reasoned that such behavior was a reasonable intrabrand restraint to specialize dealers in selling its products to specific customers, and considered that the relevant market was larger than the one originally analyzed by the CNDC, since it included all the automobile suppliers that operated in Argentina at that time (and not only the dealers that sold Ford's cars).

After the Acfor-Igarreta decision, the vast majority of the cases related to vertical restraints ended without penalties. Both the CNDC and the courts considered that the objected exclusivity and territorial restraint clauses were in fact means that the firms used to organize their marketing when competing against other firms. A particularly strong application of this criterion appears in "SADIT and others vs. Massalin Particulares and others" (2000), where the two main tobacco companies that operated in Argentina were accused for having changed their distribution scheme, from a system in which their wholesale cigarette distributors were the same to another system in which each wholesale distributor became the exclusive dealer of one of the companies (and there were also exclusive territories for each distributor). In its consideration that those practices were not anticompetitive, the CNDC analyzed the business environment in which they took place, and found that in fact they had been the result of a process of increasing competition between the two main cigarette manufacturers (Massalin Particulares and Nobleza Piccardo). Those companies were interested in exerting a closer control of their distribution channels to compete more aggressively for capturing the smokers' preferences. The reduction in the intrabrand competition implied by the objected practices, therefore, was more than compensated by an increase in the interbrand competition that was taking place at the same time.[22]

Exclusivity, however, has been objected by the Argentine antitrust authorities in cases where interbrand competition was unable to compensate a reduction in intrabrand competition, and there were no clear gains related to exclusive dealing. A particularly important example in this respect is "CNDC vs. Prisma and others" (2017), where a scheme of exclusivity related to the marketing of the Visa credit card was deemed to generate high fees for the retail merchants that had to pay for the

[22] This idea is no doubt inspired by the antitrust doctrine that began with the US Supreme Court

processing of that card. The scheme itself was also seen as a mechanism to suppress competition among commercial banks, which under different conditions would have had to compete to offer their credit card processing services to the retail merchants. Under the exclusivity scheme, conversely, those banks were partners inside a single firm that marketed the Visa credit card in Argentina (Prisma), and were implicitly colluding to set processing fees at a relatively high level. That was why this case, which did not end with fines but with a commitment from the defendants, was closed only after those defendants proposed to eliminate the exclusivity scheme to market the Visa credit card, and to sell the shares that the commercial banks had in Prisma to a company that did not previously operate in Argentina.

Another vertical restraint that has appeared in several Argentine antitrust cases is resale price maintenance, but in general those cases have ended with decisions that accepted that practice as legal. In particular, maximum resale price maintenance has never been considered illegal, and the main example of this can be found in "FECRA and others vs. YPF" (1995). In that case, the CNDC explicitly stated that setting maximum resale prices by a fuel refiner (YPF) was a means that such refiner had to compete more effectively against other refiners, and that it implied a benefit (and not a damage) to the general economic interest, since it allowed consumers to obtain fuel products at lower prices.

Minimum resale price maintenance, conversely, was found to be illegal by the antitrust authority in a case known as "CNDC vs. TRISA, TSC and others" (2003). In that case, two sports TV program suppliers that belonged to the same economic group (TRISA and TSC) signed an agreement with the three main cable television operators of the city of Buenos Aires (Multicanal, Cablevisión and VCC) to set a minimum price at which those operators would sell the broadcasting of the main national soccer games to their viewers (on a "pay-per-view" basis). The CNDC understood that the agreement was a way to restrict competition among cable television operators, whose result was the creation of a monopoly rent that was mainly appropriated by TRISA and TSC. The antitrust authority imposed fines to all the firms that signed the

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decision in the case known as "Continental vs. GTE Sylvania" (1977), 433 US 36.

minimum resale price maintenance agreement, but those firms appealed the decision to the National Court of Appeals on Criminal Economic Matters. That court reversed the administrative resolution, arguing that in fact the objected resale price maintenance did not restrict competition between the accused sports program suppliers and other TV program suppliers that competed against them.

Another, relatively original, case of vertical restraints that can be found in the Argentine antitrust case law is "Queruclor vs. Clorox" (2016), in which a dominant bleach supplier (Clorox) was fined for having practiced a business strategy that implied limiting the discretion of wholesale and retail sellers to price its product in relationship with competing bleach brands. That strategy consisted of imposing resellers a "maximum price gap" between Clorox's main product (Ayudín) and other bleach brands, which implied that those sellers were not able to lower the price of competing products. Apparently, this reduced the sales of those products, making the market less competitive. This case was also noticeable because the fine was set based on the "illegal profit" obtained by Clorox, which was estimated in 50 million Argentine pesos.[23] That fine, however, was appealed by the defendant, and once again the administrative decision was reversed by the National Court of Appeals on Criminal Economic Matters (which considered that the action against Clorox had prescribed, due to excessive delay in deciding the case).

7. Exploitative abuses of dominance

The exploitative abuses of dominance are a relatively rare cause of antitrust penalties throughout the world. Moreover, in some antitrust systems they are not even considered as an offense, since they do not create an actual damage to competition but are a situation in which the lack of competition allows a firm to exert its market power more effectively. The countries that follow the US tradition of objecting monopolization practices rather than abuses of dominance, for example, tend to consider that the so-called exploitative abuses of a dominant position are legal, as long as they do not imply exclusionary practices nor they are prohibited by other

[23] This figure was roughly equivalent to US$ 5 million, at the time when the case was decided.

regulatory rules.[24]

Following the European tradition, however, the Argentine competition law considers that an abuse of dominance can occur either by exclusionary or by exploitative reasons. That means that a dominant undertaking can be found guilty of abusing its market position if it establishes prices or commercial conditions that are different to the ones that would exist if there were effective competition in the market (and those conditions generate damage to the general economic interest).[25] The importance of that criterion in current Argentine case law is highly significant, and this is mainly due to the fact that one of the most noticeable cases in the Argentine antitrust history ("CNDC vs. YPF", 2002) is precisely a case of exploitative abuse of a dominant position.

"CNDC vs. YPF" (2002) is an important case for two reasons. On one hand, it ended with one of the largest fines ever decided in an antitrust case in Argentina.[26] On the other hand, that penalty from the Secretary of Commerce, Industry and Mining was affirmed by both the National Court of Appeals on Criminal Economic Matters and the Argentine Supreme Court. The issue analyzed in the YPF case was the pricing policy of the defendant concerning its wholesale sales of liquefied petroleum gas (LPG). YPF was the largest supplier of LPG in Argentina, and it was also the largest exporter of that product. The CNDC and the courts that intervened in the case considered that it had a dominant position in the Argentine LPG market, since the other existing suppliers had very minor market shares and YPF was the company that controlled the majority of the infrastructure needed to supply LPG.

The key factual evidence of the YPF case was that, when selling LPG to

[24] The doctrine established by the US Supreme Court in "US vs. Grinnell" (384 US 563, 1966), for example, considers that the two elements that define the offense of monopolization are the possession of monopoly power in the relevant market, and the willful acquisition or maintenance of that power. More recently, in "Verizon vs. Trinko" (540 US 398, 2004), the US Supreme Court explained that "the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful, but it is an important element of the free-market system".

[25] This criterion can also be considered as the standard that is applicable in the European Union. See, for example, the decision of the European Court of Justice in "European Commission vs. United Brands" (1 CMLR 429, 1978), where a firm was found guilty of an abuse of dominance for having discriminated among customers located in different European countries.

[26] The imposed fine was equal to 109 million Argentine pesos, which at the time that it was set by the Secretary of Commerce, Industry and Mining (1999) was equivalent to 109 million US dollars.

foreign buyers, the accused firm charged substantially lower prices than the ones that it charged to domestic buyers (for example, to local distributors), without having any justification based on cost or quantity differences. The theory underlying the case was that YPF was setting an artificially high domestic price, and that it was restricting the local supply by selling its product to foreign markets at a lower price. This created damage to the general economic interest, because the Argentine LPG consumers ended up with higher prices and smaller quantities than what they would otherwise have, if the objected price discrimination had not taken place.[27]

Due to its noticeable particularities, however, the YPF case has been one of the very few examples in which exploitative price discrimination has been seen as an actual antitrust offense in Argentina. In "R. Lloveras vs. Cablevisión" (2002), for example, the CNDC considered that an alleged price discrimination between cable TV customers in two districts of the same city (Río Cuarto, in the province of Córdoba) was not illegal, but it was the consequence of an increase in competition in one area of that city. Similarly, in "CNDC vs. El Tehuelche and PCR" (2017), it was considered that the difference in prices that a cement producer (PCR) charged in different regions of Argentina was also the result of a business strategy that such a company had, in order to compete in a market in which it was not the dominant firm.

The Argentine antitrust case law also has a few examples of exploitative abuses of dominance in which the defendants have been punished because of practices that harmed their suppliers rather than their customers. The first case in which this exercise of monopsony power was considered illegal was "General Milking Union vs. Popular Cooperative of Santa Rosa" (1982), in which the CNDC recommended to fine a producer of dairy products because of exploitative practices against its milk suppliers. That producer, who was the only buyer of milk in a certain area of the province of La Pampa, was found guilty of discriminating among its suppliers and setting artificially low prices for the milk that it bought from them. Similarly, in "CNDC vs. Welbers Industries" (1983), a sugar producer was found

[27] Price discrimination is one of the practices cited in article 3 of the Act No. 27,442 that can be considered as examples of exploitative abuses of dominance (paragraph "h"). Other offenses that can be included into that category and are mentioned in article 3 are abusive pricing (paragraph "a") and

guilty of abusing of its dominant position against its sugar cane suppliers, because of having set artificially low prices that could only be explained by the buying power that it possessed in the relevant market (which was the Northern area of the province of Santa Fe).[28]

However, in the vast majority of cases involving allegations of exploitative abuses of dominance, the Argentine antitrust authorities did not impose any penalty. In "A. Lafalla vs. Juan Minetti" (2000), for example, the CNDC considered that an increase in the price of cement by the company that had the largest market share in the province of Mendoza was not an exploitative abuse of a dominant position, since the defendant had applied the same increase in all the markets where it operated (without discriminating among areas in which it was presumably dominant and areas in which it was not). Similarly, in "N. La Porta vs. Telefonica and Telecom" (1997), the antitrust authority ruled that a price increase by the two monopoly suppliers of local fixed telephony that operated in Argentina (each of them in a separate geographic area) was not an abuse of dominant position, because the increase under analysis had been explicitly authorized and decided by the national telecommunications' regulator.[29]

Nevertheless, in a relatively recent case related to the music copyright's market, the CNDC found excessive pricing illegal. That case was "FEHGRA vs. SADAIC" (2019), and was begun by the Argentine federation of hotels (FEHGRA) as a complaint against the society of music authors and composers (SADAIC), which is an entity that holds the legal rights to represent musicians in order to collect their copyright fees. The dominant position of SADAIC in that market was particularly noticeable, because it was a legal monopoly established by a national statute. It was

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tying (paragraph "f").

[28] Note that, in these cases, prices were considered to be abusive because of being too low. The theory underlying the penalties, therefore, was that those prices were set at a level that was possible because of the buyer's dominant position. This was considered to be incompatible with the price level that would be expected if that dominant buyer had faced effective competition from other buyers. The Santa Rosa and Welbers cases, however, were solved in the first years of application of the Argentine competition act of 1980. The most recent Argentine case law has never again penalized behaviors related to abusive pricing in monopsony situations.

[29] Another, more recent, case that used a similar line of reasoning is "G. Corró vs. La Nueva Metropol" (2018), in which a regulated bus company was accused of excessive pricing, in a context in which its

also relatively clear that the prices charged by SADAIC to the hotels for the rights to play music were excessive, since they were considerably higher than comparable prices set by similar entities in other countries, and by prices set in Argentina by other entities that collect different types of copyright fees (e.g., book authors, actors, cinema directors, etc.). The pricing scheme of SADAIC was also objected as discriminatory, since some hotels had the chance to pay different fees at different moments of the year (due to seasonal variation in their demand) while other hotels were not allowed to do that (and they always had to pay the highest fee). All this induced the Secretary of Commerce to impose a fine of 43 million Argentine pesos, and to issue a recommendation to the Ministry of Culture, so that it begins to regulate the monopoly prices charged by SADAIC (in order to avoid future instances of excessive prices imposed by that entity).[30]

8. Horizontal mergers

If we analyze the application of competition law to merger cases, we can find that, in Argentina, horizontal mergers have been generally prohibited or conditioned if they create a monopoly in a relevant market. For example, the first merger that was blocked by the Argentine competition authority was "OCA/Correo Argentino" (2001), which, if approved, would have created a monopoly in several postal service markets. The proposed transaction was in fact the acquisition of the undertaking that had the concession of the official Argentine post office by its main private competitor. Based on its analysis, the CNDC argued that the two firms were the only companies that operated in several relevant product markets (the ones referred to ordinary letters, registered letters, telegrams, and banking clearing operations). Although both firms were also in other markets in which they did face competition from other suppliers (e.g., package distribution), those markets were relatively

prices were actually set and approved by the Argentine transportation authority.

[30] This last part of the resolution of the Secretary of Commerce was confirmed by a sentence from the Federal Court of Civil and Commercial Matters, but the first part was reversed. Therefore, SADAIC was actually exempted from the obligation to pay the fine established by the Argentine antitrust authority in its original decision (which was roughly equivalent to U$S 1.5 million at the time when it was set by the Secretary of Commerce).

unimportant as a source of revenue for these companies.

Another horizontal merger prohibited in Argentina for antitrust reasons was "Teledigital/Esmeralda-Venado Tuerto Television" (2003), which consisted of the acquisition of the assets of two cable television companies (Esmeralda and Venado Tuerto Television) by a firm that was their only competitor in the city of Venado Tuerto (in the province of Santa Fe). Although in this case the CNDC analyzed the possible competition between the merging parties and the supplier of a substitute good (which was satellite television), it concluded that such competition was not strong enough, because cable television and satellite television were seen as different relevant markets. The efficiency gains generated by the merger (because of the elimination of overlaps among the companies' networks) were also considered to be insufficient to compensate for the damage to competition that the creation of a monopoly would entail. Finally, although the two companies to be acquired operated under a bankruptcy protection, the CNDC did not accept the use of the failing firm defense, since the proposed acquiring company (Teledigital) was not the only feasible candidate to buy the other firms' assets.[31] Indeed, there was another firm that had presented an offer, though lower, to buy those assets.

The same principle of avoiding monopoly situations that appears in the OCA and Teledigital cases can be found in a number of situations where the Argentine antitrust authorities have ordered partial asset divestitures. One early example of this is "Telefonica/AC Inversora-Atlántida Comunicaciones" (2000), where the acquiring firm was obliged to sell one of the open television channels that operated in the city of Mar del Plata. This divestiture remedy was in response to the concern that the only two open television stations of that city would belong to the merged undertaking. Similarly, in "Fresenius/RTC" (2000), the acquiring company had to sell five dialysis centers located in five Argentine cities (from a total of 95 centers controlled by the newly merged firm), because the merger, if approved unconditionally, would have created a monopoly in those cities.

[31] The failing firm defense is an argument that the merging undertakings can invoke if the most probable alternative to the increase in market concentration generated by a merger is the exit of the acquired firm from the market. This defense is explicitly analyzed in section VII of the current merger

Partial divestiture was also the remedy proposed by the CNDC to solve the main anticompetitive concerns raised by the largest merger that had to be analyzed so far in Argentina, which was "Cablevisión/Telecom" (2018). That merger involved the most important cable television operator of Argentina (Cablevisión) and one of the main telecommunications' providers (Telecom). In that case there was a major concern related to the provision of internet services in 29 districts, where the two merging undertakings were the only internet suppliers. In those districts, Telecom had to sell its internet facilities and to license its internet services' brand (Arnet) to a third party (which was a firm called Universo Net), in order to restore a situation with two competing firms. Another requirement to clear that merger had to do with a behavioral remedy that consisted of prohibiting that the newly merged company could immediately offer "quadruple play services" (i.e., a bundle of fixed telephony, mobile telephony, cable television and internet). This was in order to block the possibility that Cablevisión and Telecom acquired a dominant position in an integrated market of broadcasting and telecommunications, and to let their competitors some time so that they could also offer a similar bundle of services.[32]

The idea that horizontal mergers that create a monopoly are to be prohibited or conditioned, however, is highly dependent on the definition of the relevant market in which the mergers may have effects. In "Jumbo/Home Depot" (2002), for example, the CNDC considered that supermarkets that specialized in selling building materials were not a relevant market in itself, and it pooled them together with other outlets that sold those goods. If the Argentine antitrust authority had used a narrower definition for the relevant market, that merger would have probably been forbidden, since Home Depot and Jumbo were the only firms that owned building materials' supermarkets in Argentina when the latter bought the assets of the former.

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guidelines issued by the Secretary of Commerce of Argentina, approved by Resolution 208/2018.

[32] The Cablevisión/Telecom case also included an additional structural remedy, related to the divestiture of part of the radio electric spectrum that the new economic group possessed in the mobile telephony market. However, this was mainly a requirement implied by the Argentine telecommunications' regulation, and had already been established by a previous decision from the telecommunications' authority. It was not the first antitrust merger case in which a similar requirement was imposed, since that kind of remedy had already been used to clear the transaction in "Telefonica/BellSouth" (2004), which was a horizontal merger between two large mobile telephone

Another example of a relatively wide market definition is the one applied in "Multicanal/Cablevisión" (2007), which was a merger between the two largest Argentine cable television operators. By the time it occurred, this merger implied the creation of cable TV monopolies in several cities of Argentina, but in this case the CNDC considered that cable television was not a relevant market in itself, because it competed with other types of paid TV services such as satellite television. Due to that interpretation, this merger was approved without any structural remedies, since it was considered that the newly merged company faced strong competition from a major international satellite television provider (DirecTV).[33]

The market definition used in the Multicanal/Cablevisión case, however, is in sharp contrast with the one used by the CNDC in the same year in another merger case ("YPF/Dapsa", 2007), where the acquisition of a gasoline station by the largest Argentine oil refiner (YPF) was forbidden. In that case, the relevant market was defined as constituted by five gasoline stations located in a radius of fifteen blocks, and therefore the analyzed acquisition implied that YPF would increase its market share from 66% to 88%. If the CNDC had used a wider geographic definition of the relevant market (for example, all the gasoline stations in the city of Buenos Aires) that market share increase would have been much smaller, and the acquisition would have probably been approved.

The main anticompetitive effects analyzed in the horizontal merger cases mentioned so far had to do with the unilateral increase of market power by the merging companies. The Argentine competition authority, however, has also imposed several structural and behavioral remedies in cases where coordinated effects were feared.[34] In such cases, the merged undertakings are usually required to divest certain

companies.

[33] Note the difference between the criterion used in this case and the one used four years earlier in "Teledigital/Esmeralda-Venado Tuerto Television" (2003), where cable TV and satellite TV were seen as two different product markets.

[34] The possible anticompetitive effects of a horizontal merger can be of two types. On one hand, the newly merged company can exert monopoly power in the relevant market where it operates. This is the main unilateral effect of a merger. On the other hand, a rise in market concentration provoked by a merger can increase the likelihood of collusion among the firms that remain in the market. That is the main coordinated effect that antitrust law tries to avoid when it requires a procedure of merger notification. For a deeper analysis of these issues, see Coloma (2009b), chapter 7.

assets whose size is roughly equivalent to the size of the smallest firm that participates in the merger. In "AmBev/Quilmes" (2003), for example, a Brazilian brewery (AmBev), that had a market share of approximately 11% in the Argentine beer market, bought the largest Argentine brewery (Quilmes), whose market share in Argentina was approximately 70%. The acquisition was approved, subject to the condition that the newly merged undertaking divested a factory and three beer brands whose joint market share was approximately equivalent to the one that AmBev had in Argentina before buying Quilmes. The acquirer of those brands, moreover, had to be a firm that was not already operating in the Argentine beer market, in order to foster the entry of a new player to a market that was considered to be highly concentrated.

The AmBev/Quilmes case was the first in a relatively long series of beer suppliers' mergers that occurred in Argentina during the 21st century. That series continued with transactions such as "CICSA/ICSA" (2008), "InBev/Anheuser-Busch" (2010), "ABI/Modelo" (2017) and "ABI/SAABMiller" (2018). This last merger was particularly important, since it implied the consolidation of the Argentine beer market into two main suppliers (ABI and CCU). It also required a substantial divestiture which involved all the brands acquired by ABI as a consequence of the merger, and a number of license contracts related to different brands owned by ABI and by other foreign beer companies.

The imposition of structural remedies to approve horizontal mergers, however, is relatively scarce if markets are not highly concentrated, and also in situations where the CNDC considers that entry is relatively easy or international competition is strong. Emblematic cases of this phenomenon arise in mergers that affect food product markets. Among the horizontal mergers that were approved without conditions, we can cite "Molinos/Lucchetti" (2001), where there was a large increase in concentration in the dry pasta market; "Arcor/Bagley" (2004), where the main concentration increase occurred in the biscuit market; "Arcor/La Campagnola" (2006), which implied the creation of a quasi-monopoly in the market of jam products; "Sancor/Nestlé" (2012), which involved several markets in the dairy products' industry; and "Coca-Cola/Ades" (2018), where there was a large

concentration increase in the market of ready-to-drink fruit juices.

Although most antitrust merger cases involve transactions that have to do with the acquisition of majority shareholdings in a company or group of companies, there are some cases in which competition authorities intervene in spite of the fact that the transactions imply the acquisition of minority shareholdings.[35] The most important of those cases in Argentine antitrust history is no doubt "Telefonica/Telecom" (2015), which was approved subject to behavioral remedies. This transaction occurred in Europe, and implied a partial conglomerate merger between the national telecommunications' companies of Spain (Telefonica) and Italy (Telecom Italia). In Argentina, however, those firms controlled the main competing supplying companies for both fixed and mobile telephony, and the key concern of the competition authority had to do with the lessening of competition in those markets. After a long-lasting procedure the merger was finally cleared, provided that Telefonica had ceased to hold a controlling position in the management of Telecom Italia.

9. Vertical and conglomerate mergers

Although the bulk of the antitrust analysis concerning mergers is in the study of horizontal mergers (that is, mergers among undertakings that compete in the same relevant market), merger notification procedures are applicable to all kinds of mergers, and this includes cases of vertical mergers (that is, mergers among undertakings that have a supplier/customer relationship) and conglomerate mergers (that is, mergers that are neither horizontal nor vertical). Most of those mergers are approved without remedies of any kind, and this is true in the majority of the countries of the world including Argentina. The Argentine antitrust history, however, has a few cases of vertical and conglomerate mergers that have been subject to structural or behavioral remedies, and one case of a vertical merger that was entirely blocked.

The only prohibited vertical merger so far in Argentina is "Aeropuertos

[35] In Argentina, for example, this possibility has been included in the current merger guidelines issued by the Secretary of Commerce (Resolution 208/2018, section III.2).

Argentina 2000/LAPA" (2002). It was a case in which the firm that holds the monopoly license to operate almost all Argentine airports (Aeropuertos Argentina 2000) tried to acquire the stock of the second largest Argentine airline (LAPA). The competitive danger that this merger posed, according to the CNDC, was the possibility of a vertical foreclosure, and the extension of Aeropuertos's monopoly power from the airport business to the domestic air transportation market. The theory behind the prohibition was that airports are an essential facility to supply air transportation services, and therefore an undertaking that controls that facility (and also has commercial interests in the airline business) has strong incentives to carry out exclusionary practices in order to monopolize the domestic air transportation market. Moreover, by that time the regulation imposed on Aeropuertos Argentina 2000 as a supplier of airport services was relatively lax, and the main competitor of LAPA in the Argentine air transportation market (Aerolíneas Argentinas) was in a process of bankruptcy reorganization.

Another important vertical merger analyzed by the CNDC was "Liberty Media-Hicks/Cablevisión" (2001), in which the two acquiring firms (Liberty Media and Hicks), that already owned several pay television channels, sought to acquire Cablevisión, which was one of the largest cable TV operators in Argentina. The CNDC's main concern in this case was the possibility of exclusionary practices against other television channel suppliers and other cable television operators. To reduce that possibility, the CNDC approved the merger subject to the condition that the merged firm would provide access to Liberty Media-Hicks' television channels on fair commercial terms to all interested television operators. Similarly, the CNDC requested access to Cablevisión's networks, on fair commercial terms, for all the competing television content suppliers.

A relatively strange remedy imposed by the Argentine antitrust authority in a vertical merger case was the one used in "Bridas/Esso" (2012). In that transaction, an oil producing company (Bridas) acquired the assets that a fuel refiner and distributor (Esso) had in Argentina, in a context in which neither of them were dominant in their respective markets. In order to clear that merger, however, the CNDC requested a

commitment to increase the oil processing capacity of the refining facilities that Bridas was acquiring, as a way to cooperate with a policy that the Argentine government was conducting in the energy area. This is a rare example in which the concept of "general economic interest" was used by the antitrust authority with aims that seemed to be dissociated of competition rules, since the objective of the imposed remedy was not to increase competition but to increase fuel supply, as a way to reduce Argentina's dependence from foreign energy markets.

Most other vertical mergers, conversely, were approved without requiring any structural or behavioral remedy. In general, this has occurred because they posed very few anticompetitive concerns, due to the fact that either the acquiring firm or the acquired undertaking had a relatively small share in the relevant markets where they operated.[36] Examples of those transactions are "Maersk/Terminal 4" (2001), which was a merger between an international shipping company and the firm that had the concession of one of the harbors in the port of Buenos Aires; "NewsCorp/DirecTV" (2005), which was a merger between a television channel supplier and a satellite television operator, and "Pampa Energía/EMDERSA" (2015), which was a merger between a firm that controlled several power generating plants and another firm that controlled several electricity distribution companies.

The tendency to approve vertical mergers without remedies seems to be even stronger when the relevant markets are related to technology and innovation. In those areas, mergers tend to be cleared even when market shares are relatively high, as we see in examples such as "Google/Lenovo" (2016), which was a merger between a major software supplier and a major computer manufacturer, and "Google/Motorola" (2014) and "Microsoft/Nokia" (2017), which were acquisitions in which a major software supplier was buying a large mobile telephone manufacturer.

If vertical mergers are usually unable to distort competition, the same can be said about most conglomerate mergers. In the relatively short history of merger control in Argentina, for example, there are no cases of conglomerate mergers that

[36] The current Argentine guidelines, for example, establish safe harbors for vertical mergers that indicate that transactions in which both parties have less than 30% of their respective (upstream and downstream) markets are generally unable to create competition problems, and are therefore likely to

have been prohibited or substantially conditioned. Among the conglomerate mergers that the CNDC has analyzed, several cases involved market extension mergers (i.e., mergers among undertakings that operate in the same business but in different markets), and all of them were approved without restrictions. Examples of those cases are "Teledigital/Las Heras Television" (2000), which was a merger between two cable TV operators that were located in different urban areas; "Pepsi/Quaker" (2001), which was the acquisition of a cereal producer by a firm that already operated in other food product markets; and "ICBC/Standard Bank" (2013), which was the acquisition of a bank that was already operating in Argentina by a foreign bank with no previous activity in the Argentine market.

The Argentine competition law does not have any provision that establishes a distinction between mergers in which the parties are local undertakings and mergers in which one or several of them are foreign firms. However, there is one conglomerate merger case ("Petrobras/Pérez Companc", 2003) in which that distinction was analyzed by the CNDC. This was about the acquisition of an Argentine firm (Pérez Companc) that controlled the main electricity transportation company of Argentina (Transener) by a Brazilian firm (Petrobras). In that case, although the CNDC explicitly disregarded the argument of nationality as a possible competition problem, the Secretary of Competition Defense accepted a commitment offered by Petrobras to sell its shares in Transener.

10. Concluding remarks

The analysis of the Argentine antitrust law and its enforcement, which we have made in the previous sections, can be summarized through a series of concluding remarks. These are the following:

a) The Argentine competition law evolved from a system that was inspired by the US antitrust law, and was predominantly based on judicial enforcement, to a scheme which is closer to the European competition principles, and is primarily enforced by a single administrative agency. This system has produced a relatively coherent case

be approved without further analysis. See Resolution 208/2028, section VIII.

law, whose standards are a combination of US and European criteria.

b) The main distinctive characteristic of the Argentine competition law is that anticompetitive practices and mergers are illegal only if they are able to generate damage to the general economic interest. This concept has been equated to the economic concept of total surplus generated in a market. It also refers to the idea that, in the Argentine antitrust system, illegality is linked to economic damages inflicted to the market as a whole, and not to damages suffered by private individuals.

c) Most overt collusion practices, however, have been penalized without actually proving the existence of real damage to the general economic interest. Rather, cases in this area suggest that the CNDC and the Argentine courts find that overt collusion always makes society worse off than in the absence of the objected collusive agreement. This idea seems to be reinforced by a recent amendment to the Argentine competition statute introduced by article 2 of Act No. 27,442, which considers hard-core cartel practices as "absolutely restrictive of competition".

d) Firms that participate in hard-core cartels in Argentina are also eligible to a leniency program created by Act No. 27,442. That program, however, has not yet been put into practice in any actual antitrust case.

e) When there are restraints that may facilitate collusion or act as collusive devices, the Argentine antitrust system requires a more thorough proof of the damage to the general economic interest, since those restraints may also be explained by an efficiency rationale. The higher burden of proof occurs in cases of covert collusion, where it is clear that conscious parallelism is not enough to prove the existence of a collusive practice.

f) Due to the wording of the Argentine competition act, exclusionary practices may be challenged either as a lessening of competition or as an abuse of a dominant position. However, the Argentine case law about those cases is rather conservative, in the sense that both entry deterrence and predatory conduct are punished only if it is clear that there is a practice whose sole possible explanation is the exclusion of competitors, and there must be an extreme likelihood that such conduct actually excludes competitors from the market. That is probably why the only penalties that

we find in the Argentine case law due to exclusionary practices are linked to situations that can be explained using a version of the essential facilities' doctrine.

g) The Argentine competition law has also been very cautious to penalize vertical restraints, especially in cases of exclusive dealing and exclusive territories. The CNDC, for example, has ruled maximum resale price maintenance legal in all the cases analyzed thus far. Minimum resale price maintenance, on the contrary, has been considered illegal when it helped to sustain collusion among downstream competitors and when it helped to extend the upstream supplier's monopoly power.

h) The CNDC has also prosecuted cases of exploitative abuse of dominance. Although most of them ended without penalties, a few of those cases have resulted in substantial fines. The main rule that can be derived in this field is that price discrimination can be illegal if it is practiced by a dominant firm to enhance its market power, and if it generates a damage to the general economic interest that is translated into a price increase that harms domestic consumers.

i) The Argentine competition system also has a merger notification procedure whose general standards are similar to the ones used in the United States. Consequently, several horizontal mergers that would have created a monopoly in a relevant market have been blocked (or approved with significant requirements). Mergers that did not create a monopoly, but substantially increased concentration in markets with large entry barriers, have also been subject to structural remedies, such as the obligation to divest assets which are enough to compensate for the increase in concentration.

j) These rules regarding the analysis of horizontal mergers, however, are highly dependent on the definition of the market under analysis, and that is a topic in which it is difficult to make accurate predictions based on the Argentine antitrust experience. In some cases the competition authority has used relatively wide market definitions, while in others it has used extremely narrow ones.

k) Vertical and conglomerate mergers have also been subject to some prohibitions and objections, but in general this only occurs when there is an undertaking with substantial monopoly power, and there is a significant risk of vertical foreclosure and market power extension.

l) A few strange decisions concerning mergers, however, have appeared in one case of acquisition of a minority shareholding in a telecommunications' company, and in two cases related to energy markets, where antitrust law was apparently used in connection to other types of government policy.

Appendix: Excerpts from Act No. 27,442 [37]

Article 1. Agreements between competitors, concentration transactions, and other actions and practices related to the production or trade of goods and services that lessen, restrict or distort competition or constitute an abuse of a dominant position in a market, in a manner that may result in damage to the general economic interest, are prohibited and will be penalized pursuant to the rules of this Act.

Article 2. The following practices are considered to be absolutely restrictive of competition, and it is presumed that they result in damage to the general economic interest. They consist of agreements between two or more competitors whose object of effect is:
a) Concerting either directly or indirectly the selling or purchase price of goods or services at which they are offered or purchased in the market;
b) Establishing obligations of: (i) producing, processing, distributing, purchasing or marketing only a limited amount of goods, and/or (ii) rendering a limited number, volume or frequency of services;
c) Sharing, dividing, distributing or apportioning in a horizontal fashion areas, market segments, customers or supply sources;
d) Establishing, concerting or coordinating bids in auctions or contests, including the possible abstention in those auctions or contests.

Article 3. The following practices, among others, to the extent that they configure the hypotheses of article 1, constitute practices that lessen competition:
a) Fixing, agreeing or handling either directly or indirectly the selling or purchase price of goods or services at which they are offered or purchased in the market, as well as exchanging information with the same purpose or to the same effect;
b) Fixing, imposing or establishing, either directly or indirectly, conditions to (i) produce, process, distribute, purchase or market only a limited amount of goods, and/or (ii) render a limited number, volume or frequency of services;
c) Concerting the limitation or control of technological development or investments made for the production or marketing of goods and services;
d) Preventing, hampering or obstructing the entry or permanence of persons in a market or excluding them from such market;
e) Regulating goods or services markets by means of agreements in order to restrict or control technological research and development, the production of goods or the

[37] The only official version of Act No. 27,442 is the Spanish version. This English translation is therefore unofficial.

furnishing of services or hindering investments made in the production of goods or services or in their distribution;
f) Subordinating the sale of goods to the purchase of other goods or to the use of a service, or subordinating the furnishing of services to the use of other service or to the purchase of goods;
g) Subordinating the purchase or sale to the condition of not using, purchasing, selling or supplying goods or services, produced, processed, distributed or marketed by a third party;
h) Imposing discriminatory conditions for the purchasing or transfer of goods or services without reasons based on usual business practices;
i) Refusing, without justified cause, to satisfy effective orders for the purchase or sale of goods or services, under the conditions prevailing in the relevant market;
j) Discontinuing the provision of a dominant monopolistic service in the market to a public utility or public interest service provider;
k) Transferring goods or furnishing services at prices lower than their cost, without reasons based on usual business practices in order to remove competitors from the market or to damage the image, property or trademark value of its good or service suppliers.
l) Simultaneously participating, as a human person, in directive or executive positions in two or more competing undertakings.

Article 5. For the purposes of this Act, it is understood that one or more persons enjoy a dominant position when, for a certain type of product or service, that person is the only supplier or buyer in the national market or in one or several parts of the world, or when, without being the only one, he or she is not exposed to substantial competition or when, because of the degree of vertical or horizontal integration, he or she is able to determine the economic feasibility of a competitor or participant in the market, to the latter's detriment.

Article 6. In order to establish a dominant position in a market, the following circumstances shall be considered:
a) The extent to which the relevant goods or services may be replaced by other national or foreign goods or services, and the conditions and time required for such replacement;
b) The extent to which regulatory restrictions limit the access of products or suppliers or buyers to the relevant market;
c) The extent to which an undertaking has the power to unilaterally affect prices or to restrict the supply or demand in the market, and the extent to which its competitors are able to offset that power.

Article 8. Mergers and other economic concentration transactions, whose object or effect is or may be to restrict or distort competition, in a manner that may result in damage to the general economic interest, are hereby prohibited.

Article 29. The National Competition Authority will be able to issue permissions for celebrating contracts, conventions or agreements that include practices mentioned in article 2 of this Act, provided that the Authority understands that they do not generate damage to the general economic interest.

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